

1 **DRAFT – OCTOBER 7, 2004**

3 Honorable Thomas S. Zilly

10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE

13 UNITED STATES, in its own right and
14 on behalf of the Lummi Indian Nation,

15 Plaintiff,

No. C01-0047Z

16 LUMMI INDIAN NATION,

PRETRIAL ORDER

17 Plaintiff-Intervenor,

18 v.

19 STATE OF WASHINGTON, DEPARTMENT
20 OF ECOLOGY, et al.,

21 **I. JURISDICTION**

22 Jurisdiction is vested in this court by virtue of 28 U.S.C. § 1345 (one of the
23 Plaintiffs in this action is the United States of America) and by virtue of 28 U.S.C. §
24 1331 (Plaintiffs' causes of action involve issues of federal substantive law).

25 **II. CLAIMS AND DEFENSES**

26 The Plaintiffs will pursue at trial the following claims:

28 **DRAFT AGREED PRETRIAL ORDER - 1-**
United States et al v. Dept. of Ecology et al
W.D.Wa. Cause # 01cv0047Z

1 **A. Declaratory Relief:** Plaintiffs will seek a declaration by the court that:

2 1. In the Treaty of Point Elliott, the United States reserved, for the benefit
3 of the Lummi Nation and its members, all groundwater underlying the Lummi Peninsula
4 necessary to sustain a viable, prosperous and productive homeland community for the
5 Lummi Indians.

6 2. The priority date of the water so reserved is either time immemorial or, at
7 the latest, January 22, 1855, the date of the Treaty of Point Elliott, 12 Stat. 927, and this
8 priority date is senior to all Defendants.

9 3. The amount of groundwater that can safely be withdrawn from the
10 Lummi Peninsula aquifer (on an annual basis) is limited, due to limited annual recharge
11 and the fact that pumping of groundwater on the Peninsula can induce salt water into the
12 groundwater supply.

13 4. The Lummi Nation is entitled to all of the groundwater available from
14 the Lummi Peninsula aquifer, as the Nation and its members will need to use all such
15 groundwater to satisfy its present and future needs, in order to sustain a viable
16 homeland.

17 5. The groundwater resource on the Lummi Peninsula is wholly contained
18 within the Lummi Reservation, and withdrawal of groundwater on the Peninsula will
19 have no measurable impact on water resources outside the Lummi Reservation.

20 6. There is no “public water” available for appropriation under State law on
21 the Lummi Peninsula

22 7. The State of Washington has no regulatory, proprietary, or other interest
23 in the groundwater underlying the Lummi Peninsula.

24 8. The Lummi Nation and the United States have the exclusive
25 jurisdictional authority to regulate the use of groundwater on the Lummi Peninsula.

26 **B. Injunctive Relief:** Plaintiffs will also seek injunctive relief, seeking an
27

order from the court:

1. Enjoining the State of Washington and any of its political subdivisions from regulating, managing, or in any way authorizing uses of groundwater on the Lummi Peninsula.

2. Enjoining the drilling of any new wells by Defendants and their successors in interest.

3. Enjoining all uses of groundwater on the Lummi Peninsula unless such use is expressly authorized by a permit issued by the Lummi Nation

4. Enjoining all uses of groundwater on the Lummi Peninsula in conflict with the rights of the United States and/or the Lummi Nation and its members.

C. Department of Ecology's Defenses: The Department of Ecology will pursue the following affirmative defenses and/or claims:

1. Plaintiffs have failed to join all necessary parties in a timely fashion.

2. Plaintiffs cannot establish facts sufficient to warrant a declaratory judgment or injunction in their favor.

3. Land sold by Tribal allottees carried with it a proportional share of the Tribe's reserved water right. If that water was not used within a reasonable time, it became subject to allocation under state law.

4. The State of Washington has regulatory authority over groundwater on the Peninsula that is in excess of the Tribe's reserved right, as measured by the PIA standard, and water that is excess because it has been lost by the Tribe due to the sale of land to non-Indians.

5. The practicably irrigable acreage (PIA) method is the proper method for quantifying the Lummi Nation's reserved water right for consumptive purposes.

6. There is no imminent threat to tribal sovereignty from non-Indian water

usage on the Lummi Peninsula.

D. Homeowner Defendants' affirmative defenses and/or claims:

1. Both plaintiffs limit their water claims to just a portion of the Reservation. Until all water sources available to the Lummi Nation at its creation and the purpose of the Reservation have been determined, the following cannot be determined:

- a. The extent of any reserved rights.
- b. The sources and extent of water available.
- c. The extent of excess water.
- d. The extent of derivative rights.

2. City of Bellingham drinking/household water is currently piped to the Reservation for Lummi use. Lummi use of water from that source has declined in recent years. The Bellingham water piped onto the Reservation comes from a diverted source on which the Lummi claim *Winters* rights.

3. Plaintiff United States took actions which substantially reduced water flow across the Lummi Reservation. The United States should be required to reverse that action.

4. The Court should appoint a Water Master to monitor proper use of all available water sources.

5. Domestic water use by each individual Homeowner Defendant is *de minimus*.

6. Plaintiff United States opened the land in question under its policy that the land be permanently settled for homes and/or farms by Indians and/or non-Indians. Defendants complied with that policy and defendants in reliance on it spent their life assets on developing homes and/or farms in compliance with the U.S. Government's policy. The U.S. Government has now in this lawsuit reversed its policy and seeks to make permanent settlement of these lands impossible by depriving the land owners of their right to an

1 indispensable ingredient which is water. The action of the United States:

- 2 a. is estopped by their prior actions;
- 3 b. constitutes a condemnation for which just compensation should
4 be paid;
- 5 c. is barred by waiver and/or acquiescence;
- 6 d. places plaintiff United States in a conflict of interest regarding the
7 reversal of policy; and
- 8 e. is responsible for the Lummi Nation's present complaints.

9 7. There is no shortage of fresh water for the Lummi Reservation.

10 **E. The Water Association Defendants' affirmative defenses and/or**
11 **claims:**

12 1. Failure to state a claim upon which relief may be granted.

13 2. There is no evidence that the Defendant's groundwater withdrawals are
14 adversely impacting the Plaintiff's water rights or water use or are adversely impacting
15 the Lummi Peninsula aquifer(s).

16 3. The Associations are utilizing water that is not otherwise available to
17 Lummi or which would be wasted if not withdrawn by the Associations.

18 4. The plaintiffs' reserved water rights, if any, to Lummi Peninsula
19 groundwater are junior in priority to the Defendants'.

20 5. The Plaintiffs assert Reserved Water Right Claims to ground and surface
21 water located outside the Lummi Peninsula case area which are available to satisfy the
22 "primary purpose" of the Reservation, whatever that may be.

23 6. The Lummi Nation has failed to pursue its legal remedies by failing to
24 pursue legal action against parties responsible for polluting the Nooksack River and
25

1 parties responsible for shutting off the flow of freshwater into the Lummi River Channel
2 and parties responsible for changing the Reservation hydrology by draining hundreds of
3 acres of wetlands.

4 5 **III. ADMITTED FACTS**

6 1. The Lummi Indian Reservation was created by Article 2 of the Treaty of
7 Point Elliott, signed in 1855 and ratified by Congress in 1859.

8 2. On November 22, 1873, President Ulysses S. Grant, pursuant to his
9 authority in the Treaty of Point Elliott, formally established the boundaries of the
10 Lummi Reservation.

11 3. The portion of the Lummi Reservation involved in this case (the “Case
12 Area” or “Peninsula”) is located entirely within the boundaries of the original Treaty
13 Reservation. _____ **will furnish the Court with a map showing the Case**
14 **Area.**

15 4. The Peninsula is approximately 6,300 acres, or one half the total uplands
16 area, of the Reservation.

17 5. The present day entity known as the Lummi Nation is a federally
18 recognized Indian Tribe that is the political successor to certain of the tribes and bands
19 that signed the Treaty of Point Elliott in 1855 and later settled on the Lummi
20 Reservation in accordance with the Treaty provisions.

21 6. All of the Reservation uplands were assigned to individual Indians by
22 restricted fee patents, pursuant to Article 7 of the Treaty of Point Elliot. The Lummi
23 Nation was not assigned any land within the upland portion of the Reservation,
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1 “upland” being everything other than “tide lands.” **All lands not assigned remained**
2 **held by the United States as trustee for the tribe.**

3 7. Pursuant to **[certain]** federal law and policies **[at the time,]**, Indians
4 receiving assignments of land on the Lummi Reservation were allowed to sell their land
5 to non-Indians, **[when the United States gave permission for specific sales.]**.

6 8. Each of the defendants, except the State of Washington Department of
7 Ecology (“DOE”), is the owner of one or more parcels of land located within the Case
8 Area.
9

10 9. Each of the defendants, except DOE, traces the title to their land to an
11 Indian owner of land assigned to an Indian family under Article 7 of the Treaty of Point
12 Elliott.
13

14 10. Non-Indian defendant land owners on the Lummi Peninsula can all trace
15 their chain of title back to one of the original Indian assignees.

16 11. At the present time several hundred non-Indians live on the Lummi
17 Peninsula.
18

19 12. The Lummi Nation now owns **beneficial** title to some uplands on the
20 Peninsula which were acquired by purchase or donation **directly from tribal members.**
21 **These lands were previously assigned to individual Indians, and have been in**
22 **restricted status since they were originally assigned.**

23 13. The Lummi Nation **also** owns land on the Peninsula that it has purchased
24 from non-Indians. **Some of these lands are in trust status and some are in fee status.**
25 **[Plaintiffs admit last sentence as true, but object as to relevancy.]**
26
27

1 14. Some of the land the United States holds in trust for the benefit of the
2 Lummi Nation and individual Indians is land that was previously in non-Indian
3 ownership.
4

5 15. Land on the Peninsula is held in different forms of ownership.
6 Approximately 90 acres of the Peninsula is held in individual native fee (i.e. it is owned
7 in fee simple by an individual Indian); 28 acres is owned in Tribal fee (i.e. it is owned in
8 fee simple by the Tribe itself); 102 acres is in the process of being converted from Tribal
9 fee to Tribal trust status (i.e. an application to convert the property to trust status is
10 pending but not yet granted); 625 acres is held by the United States in trust for the
11 Tribe; 3,647 acres is held in trust by the United States for individual Indians; and 1,553
12 acres, is held in fee by non-Indians.
13

14 16. Some of the individual trust land on the Peninsula is owned by numerous
15 individuals in undivided fractional ownership. Although the land is listed as in trust
16 status, some of the fractional interest holders possess fee interests.
17

18 17. **[Defendant Water Associations object to the wording of this**
19 **paragraph.]** The Harnden Island View Water Association withdraws and distributes
20 groundwater to certain of its members from an Association owned well, located in
21 Government Lot 1, Section 23, Township 38, Range 1 East, W.M. The Harnden Island
22 View Water Association developed its well in November 1966 without applying for a
23 groundwater withdrawal permit from the State of Washington, and it does not possess a
24 Certificate of Water Right issued by the State of Washington. The Association filed a
25 Water Right Claim with the State of Washington in 197**(cannot read date on copy
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1 **in repository**), stating that it was using 4.8 acre feet of water per year for the purpose of
2 domestic supply to 7 homes located within the Harnden Island View Plat, as recorded in
3 Book 8 of Plats page 83 in records of the Whatcom County, Washington, Auditor. The
4 Association has no records of the amount of water it actually withdraws. The
5 Association presently provides water service to eleven homes.

7 The Harnden Island View Water Association well and the lands comprising its
8 service area are wholly contained with Lummi Assignment 9A which was patented to
9 Patrick Slalhilton George, an Indian of the Lummi Reservation, in 1906, under the
10 authority of Article 7 of the Treaty of Point Elliott. On February 15, 1928, the Assistant
11 Secretary of the Interior issued a Certificate of Competency to Patrick Slalhilton George
12 covering Government Lot 1 Section 23 and Government Lot 12 Section 14, Township
13 38 North, Range 1 East, W.M. On October 20, 1947 Patrick Slalhilton George deeded
14 his interest in Government Lot 1 Section 23 and Government Lot 12 Section 14,
15 Township 38 North, Range 1 East, W.M. to Willis E. and Hazel F. Twiner. There is no
16 evidence of water use by any person within the Harnden Island View Water Association
17 service area in Section 23 and Section 14, Township 38, Range 1East, W.M. between
18 February 15, 1928, and November 1966.

21 18. **[Defendant Water Associations object to the wording of this**
22 **paragraph.]** The Sunset Water Association withdraws and distributes groundwater to
23 certain of its members from an Association owned well, located in Government Lot 2,
24 Section 26, Township 38, Range 1East, W.M. under the authority of a Certificate of
25 Water Right issued by the State of Washington May 22, 1964. The Certificate of Water
26

1 Right limits the Association to a maximum withdrawal of 35 acre feet of water per year,
2 but not more than the amount actually beneficially used, for the purpose of community
3 domestic supply. The Sunset Water Association has never withdrawn and put to
4 beneficial use more than 20 acre feet of water in any one year. The Certificate of Water
5 Right limits the place of use for water withdrawn under the authority of the Certificate
6 to the lands served by the Sunset Water Association in Sections 23 and 26 Township 38
7 N. Range 1 East, W.M. The Association has limited its service area to the Plat of
8 Boynton Sunset Tracts, Boynton Sunset Tracts No. 2, Boynton Sunset Tracts No. 3 and
9 those lots located on the west side of Robertson Road in government Lot 4, Section 23,
10 Township 38 N. Range 1 East, W.M. **(Sunset to provide more accurate legal**
11 **description).** The Sunset Water Association currently supplies water to 99 lots within
12 the service area. The Sunset well was drilled in April 1962 by the Association. The
13 Certificate of Water Right assigns a priority date of September 25, 1962.
14

15
16 The Sunset Water Association well and the lands comprising the portion of the
17 service area located in Section 26 are wholly contained with Lummi Assignment 54
18 which was patented to Jack Yakship an Indian of the Lummi Reservation, on December
19 31, 1884, under the authority of Article 7 of the Treaty of Point Elliott. Assignment 54
20 was subsequently partitioned among the heirs of Jack Yakship by Restricted Deeds to
21 Indian Lands approved by the Assistant Secretary of the Interior on October 31, 1922.
22 Theresa Allen, one of the heirs of Jack Yakship, received a Restricted Deed to
23 Government Lots 1 and 2, Section 26. On November 3, 1928, the Assistant Secretary of
24 the Interior approved a deed from Theresa Allen to S.R. Boynton. There is no evidence
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1 of water use by any person within the sunset Water Association service area in Sections
2 23 and 26 Section 34, Township 38, Range 1East, W.M. between November 3, 1928,
3 and November 5, 1962.

4
5 19. [Defendant Water Associations object to the wording of this
6 paragraph.] The Georgia Manor Water Association withdraws and distributes
7 groundwater to certain of its members from Association owned wells, located in the
8 northeast quarter of the northeast quarter of Section 34, Township 38, Range 1East,
9 W.M. under the authority of a Superceding Certificate of Water Right issued by DOE
10 June 15, 1995. The Superceding Certificate of Water Right limits the Association to a
11 maximum withdrawal of 32 acre feet of water per year, but not more than the amount
12 actually beneficially used, for the purpose of community domestic supply to not more
13 than 40 homes. The Georgia Manor Water Association has never withdrawn and put to
14 beneficial use more than 8.1 acre feet of water in any one year. The Superceding
15 Certificate of Water Right limits the place of use for water withdrawn under the
16 authority of the Certificate to the Plat of Georgia Manor, located in Government Lot 1
17 and the northeast quarter of the northeast quarter of Section 34, Township 38, Range
18 1East, W.M. The Plat contains 90 lots of record plus the well site parcel, which
19 comprises approximate one acre. The Georgia Manor Water Association currently
20 supplies water to 29 lots within the Plat. The first Georgia Manor well was drilled in
21 July 1959 by the developers of the Georgia Manor Plat without applying for a ground
22 water withdrawal permit from the State of Washington. In 1962, the developers of the
23 Georgia Manor Plat applied for a ground water withdrawal permit from the State of
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25
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1 Washington. On June 30, 1970, the State of Washington issued a Certificate of Water
2 Right to the Georgia Manor Water Association, recognizing a priority date of November
3 5, 1962. The Certificate provides that it “is specifically subject to relinquishment for
4 nonuse of water as provided in RCW 90.14.180.” On November 18, 1992, the Georgia
5 Manor Water Association completed a second well located on the same tract of land as
6 the well drilled in 1959. The Association now uses the second well as its primary
7 source of water.
8

9 The Georgia Manor Water Association wells and the Plat of Georgia Manor are
10 wholly contained with Lummi Assignment 16-B which was patented to John A. Jones,
11 an Indian of the Lummi Reservation, on August 26, 1914, under the authority of Article
12 7 of the Treaty of Point Elliott. On July 24, 1916, the United States issued a Certificate
13 of Competency to John A. Jones. On December 10, 1926, John A. Jones conveyed all
14 his interest in the northeast quarter of the northeast quarter and Government Lot 1 of
15 Section 34, Township 38, Range 1East, W.M. to Henry E. Frost by statutory warranty
16 deed. There is no evidence of water use by any person within the northeast quarter of
17 the northeast quarter and Government Lot 1 of Section 34, Township 38, Range 1East,
18 W.M. between July 24, 1916, and November 5, 1962.
19

20
21 20. [Paragraph 20 moved to new paragraph 42]

22 21. [Paragraph 21 deleted as duplicative of language in old paragraph 22]

23
24 22. The Lummi Nation currently operates four (4) community supply wells
25 on the Peninsula. These wells are operated by the Lummi Water District, which
26 supplies water for domestic uses to Lummi tribal members and approximately 250
27

1 **[non-Lummi]** households including the **[former]** Gooseberry Point system, and to a
2 few ~~Lummi tribal members~~ **customers** living off the Peninsula. The Lummi Water
3 District supplies water for municipal and commercial purposes to businesses located
4 both on and off the Peninsula. The Lummi Nation also has a well in the northwest, or
5 “Sandy Point,” area of the Lummi Reservation, that is used to supply water for fish
6 hatchery purposes. This well also supplies some water for residential purposes to tribal
7 members living in the Sandy Point area. This well is not tied into the Lummi Water
8 District wells on the Peninsula.

10 23. At least one well used by the Lummi Nation water system is on land
11 which was previously in non-Indian ownership.

13 24. **[Combined with old paragraph 25.]**

14 25. The largest commercial business on the Reservation is the Lummi
15 Casino. It is located off the Peninsula, but is supplied by the Lummi Water District by
16 piped Peninsula groundwater. The Casino currently uses **[an average of]** 28,000
17 gallons of water per day.

19 ~~[.] [Moved from old para. 36 for clarity] The Lummi Peninsula plans to use~~
20 ~~water from the Lummi Water District System, which includes Lummi Peninsula~~
21 ~~groundwater, to supply the \$11 million off Peninsula casino expansion. [The expansion~~
22 ~~has occurred and the consumption figures are included in the previous paragraph]~~

24 26. The Lummi Nation’s West Shore Well was drilled/**[is located]** next to
25 Georgia Manor’s well. **[The West Shore well is drilled to a shallower depth than**
26 **Georgia Manor’s well and is down-gradient from the Georgia Manor well.]**

1 27. **[Old paragraphs 27, 28, 29 combined for simplicity]** In recent years,
2 the Lummi Water District system has experienced a reduction in pumping capacity in
3 some of its production wells on the Lummi Peninsula, most likely caused by a build up
4 of organic material around the well screen. The Lummi Water District received
5 recommendations from a consultant as to how to correct the organic material problem so
6 as to increase pumping capacity. The Lummi Water District has not yet carried out the
7 recommendations of its consultant regarding the organic material problem.
8

9 28. **[Combined with previous paragraph.]**

10 29. **[Combined with previous two paragraphs.]**

11 30. None of the five (5) test wells drilled on the Peninsula by the Plaintiffs
12 for this litigation have **[yet]** been tied into the Lummi Water District System or
13 otherwise placed in production.
14

15 31. The Lummi Nation currently uses on the Lummi Reservation water it
16 withdraws outside the Reservation from the Nooksack River for non-potable purposes at
17 the Nation's aquaculture facility. The Lummi Nation has just completed a new
18 pumping station to continue drawing water from the Nooksack River for such purposes.
19

20 **[Plaintiffs admit as true, but object as to relevancy.]**

21 32. The Lummi Nation does not operate a fish hatchery on the Lummi
22 Peninsula.
23

24 33. The Lummi Nation operates a salmon hatchery on the Northwest, or
25 "Sandy Point" portion of the Lummi Reservation. The Sandy Point hatchery uses
26 groundwater withdrawn from one of four wells owned by the Nation located at Sandy
27

1 Point. **[Plaintiffs admit as true, but object as to relevancy.]**

2 34. The Lummi Nation operates a fish hatchery approximately twenty (20)
3 miles east of the Lummi Reservation, on Skookum Creek, which is a tributary of the
4 Nooksack River. The Nation uses groundwater from five wells located off the
5 Reservation near its Skookum Creek hatchery, as well as water from Skookum Creek.
6

7 **[Plaintiffs admit as true, but object as to relevancy.]**

8 35. There is currently no commercial irrigated agriculture on the Peninsula.

9 36. **[Original paragraph 36 moved and proposed to be deleted – Casino**
10 **expansion]**

11 37. The Lummi Nation has a contract with the City of Bellingham, whereby
12 the Nation can purchase from the City up to 1.44 million gallons per day of treated
13 potable water. A copy of such contract, which the parties stipulate is authentic, will be
14 **[offered]** introduced into evidence as Exhibit ____ **(Defendant Dept. of Ecology**
15 **proposed this Admitted Fact and will provide the Exhibit Number).** **[Plaintiffs**
16 **admit as true, but object as to relevancy.]**

17 38. There is a water line connecting the City of Bellingham's water system to
18 the Lummi Water District system, which has been built and paid for by the Nation.

19 **[Plaintiffs admit as true, but object as to relevancy.]**

20 39. Since the year 2000, less than ten percent (10%) of the water used by the
21 Lummi Water District system, on an annual basis, has been water purchased from the
22 City of Bellingham, with the balance being Lummi Peninsula groundwater. **[Plaintiffs**
23 **admit as true, but object as to relevancy.]**

1 40. **[Old paragraph 40 moved below to proposed new paragraph ____ for**
2 **clarity]**

3 41. The Nooksack River, in the vicinity of the Lummi Reservation, cannot be
4 used for potable purposes unless it is treated, as is the case with all surface water in the
5 United States.
6

7 42. The quality of the Nooksack River is suitable for irrigation and industrial
8 uses, with some treatment. **[Plaintiffs admit as true, but object as to relevancy.]**

9 43. **[Old paragraph 43 deleted as duplicative of paragraph 41.]**

10 [] Whatcom County PUD withdraws water from the Nooksack River about 3
11 or 4 miles upstream from the Lummi Reservation boundary for use by its commercial
12 and industrial customers and sells water to the City of Ferndale, which treats it for
13 domestic use. **[Plaintiffs admit as true, but object as to relevancy.]**
14

15 44. The cities of Ferndale, Lynden, and Bellingham treat and use Nooksack
16 River water for domestic, commercial, and industrial purposes. **[Plaintiffs admit as**
17 **true, but object as to relevancy.]**
18

19 45. The Department of Ecology has taken enforcement action against dairy
20 farmers to prevent the runoff of cow manure into the Nooksack River. **[Plaintiffs**
21 **admit as true, but object as to relevancy.]**
22

23 46. **[Old paragraphs 46 and 47 combined for simplicity—Can this be**
24 **cleaned up further?]** The State of Washington Department of Ecology has worked
25 cooperatively with the Lummi Nation to improve water quality in **[,and on other issues**
26 **relative to,]** the Nooksack River. **[Plaintiffs admit as true, but object as to**
27
28

1 relevancy.]

2 47. [Combined with previous paragraph.]

3 [41.] Water quality in the Nooksack River has improved in recent years to the
4 point where some shellfish beds in Portage Bay have been reopened to commercial
5 harvesting. [Plaintiffs admit as true, but object as to relevancy.]

6
7 48. The Lummi Nation and the State of Washington have a policy against
8 degrading the quality of potable water.

9 49. [Moved to new paragraph 41]

10 50. The State of Washington does not assert regulatory jurisdiction over
11 wells on the Lummi Peninsula owned by the Lummi Nation or its enrolled members.

12 [NOTE: Is there a better location for this paragraph?]

13
14 [.][Moved from para. 20] In the years prior to and following the execution of
15 the Point Elliott Treaty, the Lummi people used water from the Nooksack and Lummi
16 Rivers as one of their primary water sources. [Plaintiffs admit as true, but object as
17 to relevancy.]

18
19 51. At the time of the Treaty, the Lummi River (in 1855 the Nooksack River
20 was known as the Lummi River) had two mouths, one emptying into Lummi Bay and
21 the other into Bellingham Bay. The island of Cha-Cho-Sen was situated at the point of
22 separation of the mouths. As a result of natural and man made events, the majority of
23 the flow into the Lummi Bay was diverted to Bellingham Bay, and the island became
24 what is now known as the Lummi Peninsula.

25
26 52. Between 1926 and 1934, the United States carried out a dyking project

1 on the Lummi Reservation, which included dyking and draining several hundred acres
2 of wetlands on the Lummi Reservation. **[Plaintiffs admit as true, but object as to**
3 **relevancy.]**

4
5 53. At the present time there is no water flow from the Nooksack River into
6 the Lummi River channel except during flood events, when some water spills into the
7 channel through a culvert installed in a dyke along the Nooksack River. **[Plaintiffs**
8 **admit as true, but object as to relevancy.]**

9
10 54. At high tide, salt water from Lummi Bay flows into the Lummi River
11 channel. At high tide, salt water from the Bellingham Bay flows into the Nooksack
12 River.

13 55. **[Combined with previous paragraph for simplicity.]**

14 56. There is a hydrologic connection between the Nooksack River and
15 groundwater on the Lummi Peninsula. **The United States, the Lummi Nation and the**
16 **State of Washington Department of Ecology contend that this connection consists of**
17 **an extremely limited flow from the Peninsula toward the River through saline**
18 **ground water which does contribute to recharge of the Peninsula aquifer or**
19 **measurably impact any water supply outside the Peninsula. The Homeowner and**
20 **Water Association defendants contend that there may be an unquantified potable**
21 **water flow from the River to the Peninsula.**

22
23
24 57. The Lummi Water Resource Manager testified that wells near the
25 Nooksack River in the Everson area, about thirty (30) miles north of the Reservation, are
26 in hydraulic continuity with the River, and pumping those wells draws water from the
27

1 Nooksack River to the wells. **[Plaintiffs admit as true, but object as to relevancy.]**

2 58. **[Deleted as duplicative of old paragraphs 60 and 61.]**

3 59. **[Separate from this case]** The Lummi Nation asserts **[rights to the**
4 **waters of]**~~reserved water rights doctrine claims to the Nooksack River~~ **[under the**
5 **federal Indian reserved rights doctrine for consumptive uses]** including **[but not**
6 **limited to agricultural, industrial,]** domestic, commercial and municipal, that are prior
7 in time to other known claims. **[In addition, the Lummi Nation has non-consumptive**
8 **water claims for fisheries purposes.]** The validity and extent of such claims has not
9 been determined and is contested. **[Plaintiffs admit as true, but object as to**
10 **relevancy.]**

11 60. **[Propose to delete as inaccurate or duplicative of the next paragraph.]**

12 **[Separate from this case]** The Lummi Nation asserts claims to groundwater located
13 outside the Lummi Peninsula case area, including the Sandy Point area of the
14 Reservation, as well as to groundwater located off the Reservation. The validity and
15 extent of such claims has not been determined and is contested. **[Plaintiffs admit as**
16 **true, but object as to relevancy.]**

17 61. A freshwater aquifer underlies the northwest, **[or Sandy Point,]** area of
18 the Reservation that the Tribe accesses by means of the Vern Johnson well. This aquifer
19 likely extends north of the Reservation boundary. The Nation asserts reserved rights to
20 this aquifer. The validity and extent of such claims has not been determined and is
21 contested. **[Plaintiffs admit as true, but object as to relevancy.]**

22 62. **[Deleted as duplicative of old paragraph 59.]**

1 63. The amount of groundwater potentially available on the Lummi
2 Reservation from all sources has not been determined. The percentage that Lummi
3 Peninsula groundwater comprises of the total amount of groundwater available from
4 Reservation aquifers has not been determined. **[Plaintiffs admit as true, but object as
5 to relevancy.]**
6

7 64. **[propose to delete as duplicative]** The amount of surface water and
8 ground water from all sources potentially available to the Lummi Nation has not been
9 determined. **[Plaintiffs admit as true, but object as to relevancy.]**
10

11 65. **[propose to delete as duplicative]** The parties are not aware of any
12 studies which have been conducted to quantify **[definitively]** the amount of ground water
13 available from under other areas of the Lummi Reservation, including Sandy Point,
14 Portage Island or the Lummi/Nooksack flood plain. **[Plaintiffs admit as true, but
15 object as to relevancy.]**
16

17 66. **[Combined with old paragraph 63.]**

18 67. Over twenty (20) years ago, the Lummi Nation created a free trade zone
19 on the Lummi reservation. To date no businesses have located in the Lummi
20 Reservation Free Trade zone. **[Plaintiffs admit as true, but object as to relevancy.]**
21

22 68. The Lummi Nation has zoned over 1100 acres of land on the Reservation,
23 located outside the Lummi Peninsula case area for residential, municipal, commercial
24 and industrial use.

25 69. The Nation is considering locating a hotel, movie theater, bowling alley
26 and other businesses off the Lummi Peninsula, next to its Silver Reef Casino.
27

1 70. The Lummi Nation's Silver Reef Casino pays competitive wages and
2 benefits to its employees.

3 71. Approximately sixty percent (60%) of the employees at the Nation's
4 Silver Reef Casino are **[non-Lummi]**. One reason approximately sixty percent (60%) of
5 the employees at the Silver Reef Casino are **[non-Lummi]** is that there is **[currently]** an
6 absence of qualified Indian applicants to fill the positions. [Plaintiffs admit as true, but
7 object to relevancy.]
8

9 72. **[Combined with previous paragraph for simplicity.]**
10

11 73. The Lummi Nation is governed by an eleven member Lummi Indian
12 Business Council (LIBC). Only adult enrolled members of the Lummi Nation are
13 eligible to vote for the LIBC members or serve on the LIBC. **[Plaintiffs admit as true,**
14 **but object as to relevancy of second sentence.]**

15 74. As of April 8, 2004 there were 4,104 enrolled members of the Lummi
16 Tribe.
17

18 75. A number of persons of Indian blood reside on the Peninsula who are not
19 members of the Lummi Nation.

20 76. Population figures used by one of the United States' expert witnesses for
21 this litigation, Dr. Gretchen Greene, include Indians who are not members of the Lummi
22 Tribe, since some Indians living on the Reservation are not members of the Lummi
23 Tribe.
24

25 77. EPA standards use a criterion of up to 250 milligrams per liter as
26 acceptable for drinking water. **[NOTE: this needs a better location, and needs to**
27

1 **include state and tribal 100 milligrams guidance standards.]**

2 78. Starting in 2004, for one year only, the Lummi Nation will pay a base
3 water charge and sewer charge for tribal members who own homes they occupy on the
4 Lummi Reservation. The Lummi Nation will not pay such charges for non-Lummi
5 members. **[Plaintiffs admit as true, but object as to relevancy.]**

7 79. The DOE has established minimum flows in the Nooksack River, with a
8 priority date of 1986, for beneficial instream uses. Instream flow is a state water right.
9 This minimum instream flow right in the Nooksack River is not fulfilled approximately
10 41.5 percent of the time.

12 80. The well designated T38N R2E-6D (Mohs well) at page 6 of Scott
13 Bender's expert witness report is not located in the northwest quarter of the northwest
14 quarter of Section 6, Township 38 North, Range 1 East W.M. The Mohs well is located
15 in the northwest quarter of the northeast quarter of Section 4, Township 38 North, Range
16 1 East W.M. which is approximately 2.5 miles east of the location cited by Bender.

18 **[Defendant Water Associations to verify location or offer alternative language.]**

19 81. In 1926 the Lummi Nation filed a Petition in the United States Court of
20 Claims, Cause No. ____ **[Defendants proposed this Agreed Fact and will provide**
21 **more information about the Court of Claims case to which they refer]. [Plaintiffs**
22 **admit as true, but object as to relevancy.]**

24 **82. Proposed agreed facts regarding individual water use and title**
25 **histories to be provided by Homeowner Defendants.**

26 **IV. FACTUAL CONTENTIONS**

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1 5. No potable surface water is available for withdrawal on the Lummi
2 Peninsula and the sole source of potable water on the Lummi Peninsula is groundwater.
3 The sole source of recharge to the Lummi Peninsula aquifer is precipitation falling on the
4 Lummi Peninsula.
5

6 6. The amount of groundwater that can be withdrawn on the Lummi Peninsula
7 without inducing salt water intrusion into the potable water supply at levels above 100
8 mg/l (the “theoretical maximum annual safe yield” of the aquifer) is approximately 910
9 acre feet per year, and the actual, practically available safe yield of the aquifer is
10 substantially less than 910 acre feet per year.
11

12 7. Census data demonstrates that the Indian population on the Lummi
13 Peninsula has grown and trends indicate that the population on the Peninsula will
14 continue to grow. Based on population and water use projections, the present and
15 reasonably foreseeable future needs of the Lummi Nation and its members for its most
16 basic domestic and related purposes will exceed the theoretical maximum annual safe
17 yield of the aquifer on the Lummi Peninsula within 30-40 years, and possibly earlier.
18 Further, if the Lummi Nation implements specific economic or community development
19 projects such as a raspberry agricultural project, a fish hatchery project, or a tomato
20 greenhouse project, such projects could use the entire supply of available groundwater on
21 the Lummi Peninsula almost immediately.
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23 8. There is no public water available for appropriation under State law within
24 the Lummi Peninsula.
25

26 9. To prevent salt water intrusion on the Lummi Peninsula, and to ensure that
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1 the potable water supply available for use on the Peninsula can be withdrawn at the
2 maximum safe yield of the aquifer, it is necessary that the Lummi Nation carefully
3 manage and regulate uses of all groundwater on the Peninsula, including uses of
4 groundwater by nonmembers. Such regulation and management should include the
5 implementation of coordinated pumping regimes, withdrawal limitations, well location
6 restrictions, and other management techniques. Such regulation and management is
7 necessary to protect the health, safety, and welfare of the Lummi Nation and its
8 members.

10 10. To protect the groundwater resource on the Lummi Peninsula, it is
11 necessary to prohibit all new uses of groundwater by Defendants.

13 11. The Lummi Nation has the expertise and the infrastructure to manage the
14 groundwater resource on the Lummi Peninsula.

15 12. The State does not have the legal or practical ability to manage the Lummi
16 Peninsula aquifer as a unitary resource.

18
19 **B. Defendant Department of Ecology's Contentions:**

20 1. The primary purpose of the Lummi Reservation was agricultural. The
21 United States and the Tribe intended, by entering into the Treaty of Point Elliott, to set
22 aside land that the Tribe could use for farming.

23 2. Under the practicably irrigable acreage (PIA) method, the Lummi's
24 reserved water right for consumptive purposes on the Peninsula equals the amount of
25 water needed to irrigate all practicably irrigable acreage on the Peninsula less the amount
26

1 of water needed to irrigate those practicably irrigable acres owned by non-Indians on the
2 Peninsula.

3 3. The amount of water needed to irrigate all practicably irrigable acreage on
4 the Peninsula is 744 acre feet per year. Of this amount, 154 acre feet per year is needed
5 to irrigate PIA lands held in non-Indian ownership. Therefore, the Lummi Nation's
6 reserved water right for consumptive purposes on the Peninsula is at most 590 acre feet
7 per year.
8

9 4. The Lummi Nation's reserved water right for consumptive purposes on
10 the Peninsula calculated using the PIA method is sufficient to supply a population of
11 approximately 5000, including domestic, municipal, and commercial needs.
12

13 5. The future water needs calculated by the United States for the Lummi
14 Nation for domestic, municipal, and commercial purposes is based on a flawed
15 methodology that requires attempting to predict the future Tribal population of the
16 Peninsula. However, it is impossible to predict the future Tribal population of the
17 Peninsula with any reasonable degree of accuracy.
18

19 6. The future water needs calculated by the United States for the Lummi
20 Nation for irrigation purposes is inaccurate because the United States did not perform a
21 PIA calculation. It is also inaccurate because it did not consider whether land held by
22 non-members contains practicably irrigable acreage.
23

24 7. The future water needs calculated by the United States for the Lummi
25 Nation are significantly inflated over what might reasonably be expected to occur based
26 on the Tribe's past water usage and future concrete plans for development on the
27

1 Peninsula.

2 8. There is sufficient water in the aquifer underlying the Peninsula to supply
3 the reasonably foreseeable future needs of the Nation as well as the needs of current and
4 reasonably foreseeable future non-Indian homeowners on the Peninsula.
5

6 9. Ecology has exercised care and caution in regulating groundwater on the
7 Reservation, in part to prevent saltwater intrusion, and at least in part to avoid impairing
8 existing water rights of the Lummi Nation and its members.

9 10. Exempt wells owned by non-Lummi on the Peninsula pump an average of
10 about 30 AFY in total.
11

12 11. There is presently no interference with Lummi wells by non-Lummi
13 wells, and no ongoing saltwater intrusion on the Peninsula.

14 12. In the event the Court concludes that water for domestic use should be
15 awarded to the Nation in addition to the PIA, the amount of such additional water should
16 be calculated as a percentage of the PIA consistent with on-farm domestic use.
17

18 13. In the event the Court concludes that the Lummi Nation is entitled to all
19 the groundwater underlying the Lummi Peninsula, the court should require the Nation to
20 serve present and future non-Indian homeowners on the Peninsula sufficient water for
21 their domestic needs from the water from the Bellingham water line.
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1 the extent of any such connection.

2 8. Following completion of its collection of data, Aspect Consulting estimated
3 the annual sustainable yield of ground water on the Lummi Peninsula at 3,900 acre feet per
4 year. After requests by the Lummi to lower that sustainable yield figure, Aspect lowered it
5 in steps down to 1,050 acre feet per year.
6

7 9. Homeowner Defendants agree to reduce the volume of their water claims
8 allowed by Washington State law by ninety percent (90%).
9

10 10. The Lummi Peninsula case area contains approximately 6,200 acres, of which
11 1/3 is wetland and 2/3 is forested.

12 11. The Lummi Nation's Water Resource Manager believes the Lummi Peninsula
13 aquifer extends under Portage Island. The Lummi Nation cannot explain why Portage Island
14 was not included in the case area, nor why it was not studied or tested.

15 12. The Lummi Nation claims prior reserved water rights to all waters from the
16 Fraser River in Canada to South Seattle.
17

18 13. In 2000, non-Indian home owners' wells on the Lummi Peninsula used three
19 percent (3%) of the available Peninsula ground water, Indians used seventeen percent (17%),
20 and eighty percent (80%) was not used.

21 14. The Consent Decree in the *Hallauer* case provided for court supervision for
22 the following five years. During those five years the sewer system worked satisfactorily.
23 After the five year court supervision period terminated, the Tribe began refusing sewer
24 connections to non-Indian property owners on the Lummi Peninsula.
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26 15. The entire reservation will be hooked up to the same water system when there
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1 is enough demand, but there is insufficient demand at present.

2 16. The Nooksack River flows through the Reservation, is adjacent to the Lummi
3 Peninsula, and empties 2.6 million acre feet of fresh water per year into Bellingham Bay.

4 17. The Lummi Nation has proposed many commercial endeavors, but few
5 have been completed and even fewer have been financially successful. The talked about
6 commercial tomato greenhouse project has never been proposed for the Lummi
7 Peninsula. The Lummi are aware that businesses do not locate on the Reservation
8 because business owners fear the Lummi Tribe.

9 18. In spite of the infusion of millions of federal dollars, the Lummi aquiculture
10 operates at a financial loss. The Lummi fish hatchery operates at a financial loss.

11 19. The U.S. Census Bureau reports that currently sixty (60) nations, including
12 most of Western Europe and former communist countries, have negative growth rates, and
13 that number will soon expand to eighty (80) nations. The U.S. Census Bureau estimates that
14 by the year 2043, the global population of the world will begin to decline.

15 20. The United States advertised land parcels owned by individual Indians on the
16 Lummi Reservation for sale and encouraged non-Indians to purchase land on the Lummi
17 Reservation under previous United States policies. Deeds conveying fee simple title to non-
18 Indian purchasers were approved in writing by the government of the United States and
19 contained no reservations of any portion of title.

20 21. A Lummi stated goal, for at least the last ten years, is to reacquire all non-
21 Indian property within the Reservation's boundaries.

22 22. Future membership in the Lummi Tribe depends on who Lummi members
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marry. If a Lummi member with less than fifty percent (50%) Lummi blood marries a non-Indian, their children cannot become members of the Tribe under current rules.

23. Plaintiffs' experts have not determined where the north end of the Peninsula aquifer is located. Aspect data showed a lot of recharge at the north end of the Lummi Peninsula. Aspect's scope of work recommended that a well be drilled to 300 feet in depth to fully penetrate the Peninsula aquifer. This was not done.

24. The Lummi Code of Laws Title 17 (enacted 1/19/04) applies to all persons using Lummi Nation water and provides in part that:

All permits issued under this code are provisional . . . the Executive Director may recover a civil penalty not exceeding Five Thousand Dollars (\$5,000) per day for each prohibited act . . . the Tribal Court may exclude from the Reservation any person who engages in an activity prohibited by this Code . . . and the decision of the Tribal Court of Appeals shall be final, binding and enforceable.

25. The current unemployment rate on the Reservation is approximately fifty percent (50%). The primary employers on the Reservation are the Lummi Tribe, the Indian College, and the Lummi Casino.

D. Water Association Defendants' Contentions:

1. The SEAWAT model is not a proven reliable method for quantifying an aquifer's sustainable yield

2. The Lummi Peninsula is not an isolated hydrological system receiving recharge solely from precipitation falling on the Peninsula.

3. Even if the SEAWAT Model can be used to quantify an aquifer's sustainable yield, Aspect lacked the necessary data needed to reliably predict the amount of water available from the Lummi Peninsula aquifer.

1 4. The SEAWAT Model results were restricted to tribally controlled land having
2 excluded non-Indian land from the modeling process, and therefore the results do not reflect
3 the sustainable yield of the entire aquifer.

4 5. The purpose of the Article II Reservations, including the Lummi Reservation,
5 was to create a temporary reservation where the Indians could continue to hunt and fish until
6 being moved to the general reservation established under Article III of the Treaty.

7 6. The signatory tribes to the Point Elliott Treaty understood that the
8 Reservations created under Article II were temporary until they could be moved to the
9 general reservation, established under Article III of the Treaty.

10 7. The most likely location for Lummi economic activities in the future is
11 outside the Lummi Peninsula case area.

12 8. The Cohort model used by Northwest Economic Associates (NEA) is not a
13 proven reliable method for predicting the number of Lummi Tribal members in the future.

14 9. The Lummi Nation asserts Reserved Water Right claims to multiple water
15 sources, including Reservation surface and groundwater, located outside the Lummi
16 Peninsula case area, which is available to satisfy the Nation's current and future water needs.

17 10. The Lummi Nation and its members are currently using less than one-fifth of
18 the amount of water the Plaintiffs' own expert says is available from under just the Lummi
19 Peninsula.

20 11. Any water reserved under the Point Elliott Treaty was passed along to the
21 Indians receiving allotments of land and does not belong to the Lummi Nation.

22 12. There is no evidence that groundwater withdrawals by the Defendants are
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adversely impacting the aquifer or the wells of the Lummi Nation or Lummi Tribal members.

13. The Water Associations are using groundwater which, if not withdrawn by the Associations, would discharge into Lummi Bay.

IV. ISSUES OF LAW

A. Plaintiffs contend that the following issues of law need to be determined by the court:

1. Whether the purpose of the 1855 Treaty of Point Elliott was to provide a self-sustaining, prosperous homeland for the Lummi Nation and its members?

2. Whether the Lummi Nation is entitled to an 1855 (or earlier) priority date for water needed to support the purposes of the creation of the Reservation?

3. Under the circumstances of this case, is the Lummi Nation entitled to the potable groundwater underlying the Lummi Peninsula to partially meet the domestic, commercial, municipal and treaty purposes of the Reservation?

4. Whether the Court should determine the Lummi Nation's entitlement to the potable ground water underlying the Lummi Peninsula based on the Nation's present and future domestic, municipal, commercial and other Treaty needs?

5. If the Court determines that practicably irrigable acreage ("PIA") is the applicable methodology to determine the Nation's entitlement to the potable ground water underlying the Lummi Peninsula, and if that methodology shows the Nation is entitled to all the groundwater during the irrigation season, is there any water surplus to the Nation's present and future needs?

6. Whether the State of Washington has any proprietary interest in the Lummi Peninsula ground water aquifer if the court determines that all of the potable ground water underlying the Lummi Peninsula is required to support the Lummi Nation's present and future water needs?

1 7. Whether the State of Washington has any regulatory interest in the Lummi
2 Peninsula ground water aquifer if the court determines that all of the potable ground water
3 underlying the Lummi Peninsula is found to be wholly contained within the Lummi
4 Reservation and/or all of the water is required to support the Lummi Nation's present and
5 future water needs?

6 8. Whether Lummi Nations' needs for Lummi Peninsula ground water for
7 present and future potable water on Reservation lands adjacent to the Case Area can be
8 considered by the Court in its analysis of Lummi's groundwater entitlement to the Lummi
9 Peninsula aquifer?

10 9. Whether the Treaty priority date (or earlier) applies to all Treaty-related
11 purposes for which the Lummi Nation uses Lummi Peninsula ground water?

12
13 **B. Defendant Department of Ecology contends that the following issues of**
14 **law need to be determined by the court:**

15 1. Is the practicably irrigable acreage (PIA) method the proper method for
16 quantifying the Lummi Nation's reserved water right for consumptive purposes on the
17 Peninsula?

18 2. Does the state have regulatory authority over water that is excess to the
19 Nation's reserved water right as calculated by the PIA method?

20 3. When land on the reservation was allotted or assigned to individual Indians,
21 and then sold to non-Indians, did a proportionate share of the Nation's reserved water right
22 pass with the land to the non-Indian?

23 4. If a non-Indian purchaser of allotted or assigned land failed to use water
24 within a reasonable time after the purchase, did the proportionate share of the Nation's
25 reserved right associated with that land revert to the state for allocation and regulation
26 pursuant to state law?

27 5. Can the Nation establish that it has authority to regulate non-Indian water

usage on non-Indian fee land when there is no imminent threat to tribal sovereignty or any other tribal interest from such non-Indian usage and the Nation has not historically regulated water use on the reservation for anyone other than its members?

6. Was water reserved under the treaty for the primary purpose of the Lummi Reservation only, i.e. agriculture, or was water reserved under the treaty for secondary purposes also?

7. In determining the Nation's reserved water right on the peninsula, should all sources of water reasonably available to the Nation be considered?

8. Do the Plaintiffs have the burden of proving that land now held by the Nation or its members did not lose its reserved right to water because it was transferred to a non-Lummi member and the Walton rights were subsequently lost?

9. Once the Nation's reserved right for the Peninsula is quantified, is the Nation entitled under federal law to any more water over that quantified amount for the Peninsula, even if the Nation uses other sources to satisfy that right?

10. What is the priority date of the reserved water right of the Nation and its members?

C. Homeowner Defendants contend that the following issues of law need to be determined by the court:

1. Does a homeland purpose only apply in 2004 to land owned in fee or trust by the Tribe?

2. Is any homeland share of water reduced by the one-half ($\frac{1}{2}$) or two-thirds ($\frac{2}{3}$) of the Reservation not included in the case area?

3. Does the determination of water rights need to include reasonable water conservation measures?

4. Do Portage Island water and the adjoining Nooksack River need to be included in available water sources?

1 5. Does the *de minimus* rule apply to the three percent (3%) of case area water used
2 annually by individual family well owners as well as to wells pumping less than five (5) gallons
3 per minute?
4

5 6. Do reserved water rights belong to individual Indians owning fee lands within
6 the Reservation's boundaries?

7 7. Can Homeland purposes be determined for portions of a reservation, instead of
8 the entire reservation?

9 8. Are any Lummi Nation water rights limited to lands owned by the Lummi
10 Nation?
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12 9. If reserved water rights attach at the creation of a reservation, since this
13 reservation was created as a temporary location, are any reserved water rights at its creation
14 temporary?

15 10. In the United States Court of Claims No. F275, the Lummi alleged that the
16 Treaty of Point Elliott "...as read and interpreted to and as understood by the Indian tribes at the
17 signing of the same, it was stipulated that the reservations reserved in said treaty and designated
18 therein were but temporary resting places for their then present use; ..." Does the Doctrine of
19 Judicial Admissions apply to this judicial allegation?
20

21 11. Do plaintiffs have the burden of proof on issues involving first usage of water
22 on land parcels and the quantity of such use?
23

24 12. Do reserved water rights attach to lands owned in fee by non-Indians or
25 individual Indians, then reacquired by the Lummi Nation in fee or trust?

26 13. Should the Court appoint a Water Master to monitor proper use of all available
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1 water sources?

2 14. Can land owners on the Lummi Peninsula carry or pipe water from off
3 reservation sources on public roads?

4 15. Should the Court retain jurisdiction over any affirmative relief?

5 16. Have plaintiffs proven the absence of a remedy at law?

6 17. Can plaintiff United States drastically change the surface water flow through the
7 Reservation years after its creation and then sue based on the new flow rather than as it existed
8 in 1855?

9
10 **D. Water Associations Defendants contend that the following issues of law**
11 **need to be determined by the court:**

12 1. Whether the Lummi Reservation was established by the 1855 Treaty of Point
13 Elliott as a permanent homeland as claimed by the Plaintiffs or whether it was established as a
14 temporary reservation as claimed by the Defendants?

15 2. If the Lummi Reservation was established as a temporary reservation, what, if
16 any, water rights were reserved under the Reserved Water Rights Doctrine which was first
17 recognized by the United States Supreme Court in Winters v. United States, 207 U.S.
18 564(1908)?

19 3. What is the Primary purpose of the Lummi Reservation for which a Reserved
20 Water Right exists?

21 4. If a Reserved Water Right to Lummi Peninsula groundwater does exist, who does
22 the water right belong to, the Lummi Nation as claimed by the Plaintiffs, or does it belong to
23 individual tribal members, who are successors in interest to the original Indian allottees of land
24 on the Lummi Reservation?

5. Can Lummi use Lummi Peninsula groundwater to service business located off the Lummi Peninsula?

6. What priority date applies to land/reserved water reacquired by the Lummi Nation or its members from non-Indians?

7. If some method other than practicably irrigable acreage (PIA) is used to quantify Reserved Water Rights, how does the water get allocated for just one portion of the reservation without first quantifying the full amount of the Plaintiffs' Reserved Water Right for all purposes and without knowing the amount of water available from sources other than Lummi Peninsula ground water?

8. Are the Plaintiffs required to use water from sources other than Lummi Peninsula groundwater to satisfy uses not needing potable water, such as using Nooksack River Water for irrigation?

9. If the Lummi Nation has regulatory jurisdiction over non-Indian water users, can it prohibit non-Indians from continuing to use Lummi Peninsula groundwater to services their homes?

V. EXPERT WITNESSES

A. Each party shall be limited to _____ expert witness(es) on the issues of _____

B. The names and addresses of the expert witnesses to be used by each party at the trial and the issue upon which each will testify is:

1 **1. On behalf of United States:**

2 **a. Dr. Christopher Friday, will testify, Western Washington**

3 **University, 3201 Meridian Street, Bellingham, WA 98225.** Dr. Friday will testify about
4 the purpose of the 1855 Point Elliott Treaty, as confirmed by contemporaneous statements
5 and documents as well as subsequent actions and statements of United States and tribal
6 officials. Dr. Friday will testify that the purpose of the Treaty was to provide a homeland to
7 the Lummi Nation and its members. Dr. Friday will also testify about the Lummi Nation's
8 aboriginal occupancy of the Lummi Peninsula.
9

10 **b. Dr. Gretchen Greene, will testify, Northwest Economic Associates,**

11 **12009 N.E. 99th Street, Suite 1410, Vancouver, WA 98682-2497.** Dr. Greene will testify
12 about her development of a cohort component model to estimate the population of Lummi
13 members on the Lummi Peninsula over the next 100 years. Dr. Greene will also testify
14 regarding her projections of groundwater uses of Lummi tribal members on the Lummi
15 Peninsula over the next 100 years, for domestic, commercial, and municipal ("DCM")
16 purposes, and she will testify that the Lummi Nation and its members will, at some point in
17 the relatively near future, use the entire available supply of groundwater on the Lummi
18 Peninsula for DCM purposes.
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20 **c. Dr. Michael Taylor, will testify, Northwest Economic Associates.**

21 Dr. Taylor will testify about special development projects which would require the use of
22 groundwater that the Lummi Nation could initiate in the future to develop its economy. Dr.
23 Taylor will also critique the economic analysis performed by the State of Washington's
24 experts in connection with the State's "practicably irrigable acreage" analysis.
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d. Dr. Robert McKusick, will testify, Northwest Economic

Associates. Dr. McKusick will testify about the economic history of the Lummi Nation, its efforts to develop its economy, special development projects that the Lummi Nation could initiate that would require the use of groundwater, and the estimated water needs of the Lummi Nation over the next 100 years. Dr. McKusick will also critique the economic analysis performed by the State of Washington’s experts in connection with the State’s “practicably irrigable acreage” analysis.

e. Ross Waples, will testify, HKM Engineering Inc., 222 N 32nd St., Suite 700, Billings, MT, 59101.

Mr. Waples will testify about his identification of soils suitable for growing red raspberries on the Lummi Peninsula and his estimates regarding the costs associated with irrigating lands on the Lummi Peninsula to grow red raspberries. Mr. Waples will also critique the soils classification work and estimate of costs associated with irrigation on the Lummi Peninsula , performed by the State of Washington’s experts in connection with the State’s “practicably irrigable acreage” analysis.

f. Ray Armstrong, will testify, HKM Engineering Inc.

Mr. Armstrong will testify about his design of a potable water distribution system for use by the Lummi Nation and its members on the Lummi Peninsula , as well as his estimate of costs associated with constructing and operating such system. Mr. Armstrong will also testify about his comparison of costs associated with distributing groundwater on the Lummi Peninsula for domestic needs to the cost of acquiring surface water from the City of Bellingham for such purposes. Mr. Armstrong will also critique the State of Washington’s experts’ “practicably irrigable acreage” analysis.

g. Mark Shaffer, will testify, Aspect Consulting, 179 Madrone Lane North, Bainbridge Island, WA 98110. Mr. Shaffer will testify about Aspect's investigation of the hydrogeologic conditions of the Lummi Peninsula , the effects of groundwater withdrawals on salt water intrusion on the Lummi Peninsula , and Aspect's estimate of the theoretical maximum annual safe yield of groundwater on the Lummi Peninsula. Mr. Shaffer will also testify about the bases of his conclusion that the sole source of recharge on the Lummi Peninsula is precipitation.

h. Dr. Michael Riley, will testify, S.S Papadopoulos & Associates, Inc., 101 North Capital Way, Suite 107, Olympia, WA 98501. Dr. Riley will testify about the construction and calibration of a numerical computer groundwater model which was used to estimate the theoretical maximum annual safe yield of groundwater on the Lummi Peninsula

I. Brian Drost, will testify, United States Geological Survey, 1201 Pacific Ave, Suite 600, Tacoma, WA 98402. Mr. Drost will testify about his review and critique of the work performed by Aspect and S.S Papadopoulos & Associates, Inc in connection with estimating the theoretical maximum annual safe yield of groundwater on the Lummi Peninsula. Mr. Drost will also testify about the reliability of the computer groundwater model (SEAWAT) used by Aspect and S.S Papadopoulos & Associates, Inc. Mr. Drost will also testify about issues pertaining to whether the sole source of recharge on the Lummi Peninsula is precipitation.

j. **Erick Miller, may testify, Aspect Consulting.** Mr. Miller may testify about Aspect's investigation of the hydrogeologic conditions of the Lummi Peninsula, including Mr. Miller's collection of data regarding recharge on and discharge off the Lummi

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1 and extent of the case area aquifer, the expected practical safe yield of the aquifer, the
2 present and future demand for potable water supply by the Lummi Nation and its members
3 that may reasonably be satisfied from the aquifer, his review and analysis of the reports and
4 testimony of other expert witnesses who may testify in the case on behalf of other parties,
5 and the matters covered by his written report and deposition previously taken in this matter.
6

7
8 **3. On behalf of Defendants:**

9 **a. Robert Beeby, PE, will testify, Science Applications International**
10 **, 525 Anapaca Street Santa Barbara, CA 93101.** Mr. Beeby will testify regarding the
11 matters addressed in the SAIC expert witness report, including but not limited to the analysis
12 SAIC did of the practicably irrigable acres on the Lummi Peninsula and the quantification of
13 the Lummi reserved water right on the Lummi Peninsula based on that analysis. Mr.
14 Beeby's opinions and the bases for them are as set forth in that report, as it may be updated,
15 and as further explained during his deposition by the Plaintiffs in this case.
16

17 **b. Daniel R. Haller, PE, will testify, Washington Department of**
18 **Ecology Central Regional Office, 15 W Yakima Ave Suite 200, Yakima, WA 98902-**
19 **3452.** Mr. Haller will testify regarding the matters addressed in his expert witness report,
20 including but not limited to the water needs for red raspberries, existing and projected water
21 needs on the Lummi Peninsula, and rates charged to consumers by Washington water
22 treatment entities for treated water. Mr. Haller's opinions and the bases for them are as set
23 forth in that report, as it may be updated, and as further explained during his deposition by
24 the Plaintiffs in this case.
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c. Steve Hood, WRIA, will testify, Washington Department of Ecology, 3190 160th Ave SE Bellevue, WA 98088-5452. Mr. Hood will testify regarding the matters addressed in his expert witness report, including but not limited to the current water quality in the Nooksack River and its tributaries and the Department of Ecology's efforts to clean it up. Mr. Hood's opinions and the bases for them are as set forth in that report, and as further explained during his deposition by the Plaintiffs in this case.

d. Kathy Lombardi, PE, will testify, Science Applications International, 405 So 8th Street Suite 301, Boise, Idaho 83702. Ms. Lombardi will testify regarding the matters addressed in the SAIC expert witness report, including but not limited to the analysis SAIC did of the practicably irrigable acres on the Lummi Peninsula and the quantification of the Lummi reserved water right on the Lummi Peninsula based on that analysis. Ms. Lombardi's opinions and the bases for them are as set forth in that report, as it may be updated, and as further explained during her deposition by the Plaintiffs in this case.

e. **Theresa Lowe, M.A., will testify, Office of Financial Management, PO Box 43113, Olympia, WA 98504-3113.** Ms. Lowe will testify regarding the matters addressed in her expert witness report, including but not limited to a critique of the expert witness report on population projections prepared for the United States in this case by Dr. Gretchen Greene, how population projections are done for government planning purposes, and the unreliability of long-term projections for a closed, small population. Ms. Lowe's opinions and the bases for them are as set forth in that report, as it may be updated, and as further explained during her deposition by the Plaintiffs in this case.

f. **David Nazy, LHG, will testify, Washington Department of Ecology, Water Resource Program, PO Box 46700, Olympia, WA 98504-7600.** Mr. Nazy will testify regarding the matters addressed in his expert witness report, including but not limited to the amount of groundwater which will likely be available during the irrigation season for irrigation on the Lummi Peninsula. Mr. Nazy's opinions and the bases for them are as set

1 forth in that report, and as further explained during his deposition by the Plaintiffs in this
2 case.

3 **g. Donald Pittenger, PhD, will testify, Office of Financial Management,**
4 **PO Box 43113 Olympia, WA 98504-3113.** Dr. Pittenger will testify regarding the matters
5 addressed in his expert witness report, including but not limited to a critique of the expert
6 witness report on population projections prepared for the United States in this case by Dr.
7 Gretchen Greene, how population projections are done for government planning purposes,
8 and the unreliability of long-term projections for a closed, small population. Dr. Pittenger's
9 opinions and the bases for them are as set forth in that report, as it may be up-dated, and as
10 further explained during his deposition by the Plaintiffs in this case.

11 **h. Kent Richards, PhD, will testify, 805 E 4th Avenue, Ellensburg, WA**
12 **98926.** Dr. Richards will testify regarding the matters set forth in his expert witness report,
13 including but not limited to the agricultural purpose of the Lummi reservation. Dr. Richards'
14 opinions and the bases for them are as set forth in that report, and as further explained during
15 his deposition by the Plaintiffs in this case.

16 **I. Scott Bender, will testify, 815 6th Street S., Suite 5 Kirkland, WA**
17 **98033.** Mr. Bender will testify regarding the matters addressed in his Expert Witness Report,
18 dated December 20, 2003, and supplement thereto, dated August 23, 2004, and including, but
19 not limited to the likelihood of a hydraulic connection between the Lummi Peninsula and
20 water sources located off the Peninsula. Mr. Bender's opinions and the basis for his opinions
21 are set forth in his expert witness report, dated December 20, 2003, supplemental report dated
22 August 23, 2004 (including Revised Figure 1) and as further explained during his deposition
23 by the Plaintiffs on June 30, 2004.

24 **j. Dr. Don Easterbrook, will testify, 508 Ridgeway Drive, Bellingham,**
25 **WA 98225.** Dr. Easterbrook will testify regarding geology and a hydraulic connection
26 between the Lummi Peninsula and water sources located off the Peninsula and as set forth in
27

1 his expert witness report dated December 15, 2003, and his deposition on June 25, 2004.

2 **k. Mark Shaffer, possible witness only, 6837 NE New Brooklyn Road,**
3 **Bainbridge Island, WA.** Mr. Shaffer will testify as an adverse witness regarding his and
4 Aspect Consulting's work as described in his expert report. Areas of testimony will be similar
5 to those covered in his deposition taken April 29, 2004.

6 **l. Erick Miller, possible witness only, 5511 NE Ragan Lane, Poulsbo,**
7 **WA 98370.** Mr. Miller will testify as an adverse witness regarding his work on the Aspect
8 Consulting project and report. The areas of questioning will be similar to those covered at his
9 deposition taken April 30, 2004.

10 **m. Brian Drost, possible witness only, 1201 Pacific Avenue, Suite 600,**
11 **Tacoma, WA 98402.** Mr. Drost is employed by the USGS and his area of questioning as an
12 adverse witness will be his opinions and testimony regarding reports of other experts.
13 Questioning will be similar to that asked at his deposition taken June 3, 2004.

14 **n. Gretchen Greene, possible witness only, 2409 Kauffman Avenue,**
15 **Vancouver, WA 98660.** Ms. Greene is employed by NEA. Her testimony as an adverse
16 witness will center primarily around population topics and will be similar to questions asked
17 at her deposition taken June 7 and 8, 2004.

18 **o. Bob McKusick, possible witness only, 15711 NE 219'" Street, Battle**
19 **Ground, WA.** Mr. McKusick is employed by NEA. His testimony as an adverse witness will
20 be similar to his deposition taken June 9, 2004, primarily concerned with the areas covered
21 by the various reports of experts submitted by NEA.

22 **p. Woldezion Mesghinna, possible witness only, 3401 Terry Point**
23 **Drive, Fort Collins, CO.** Dr. Mesghinna is employed by Natural Resources Consulting
24 Engineers, Inc. (NRCE). His testimony as an adverse witness will be similar to his deposition
25 taken June 28, 2004, primarily dealing with his areas of expertise and review of other expert
26 reports.

1 **q. Paul Hamai, possible witness only, 32 Rio Vista Avenue, Oakland,**
2 **CA 94611.** Mr. Hamai is employed by Natural Resources Consulting Engineers, Inc.
3 (NRCE). His testimony as an adverse witness will be similar to his deposition taken June 29,
4 2004, primarily dealing with his areas of expertise and review of other expert reports.

5
6 **V. OTHER WITNESSES**

7 The names and addresses of witnesses, other than experts, to be used by each party at
8 the time of trial and the general nature of the testimony of each are:

9
10 **A. On behalf of the United States:**

11 **1. Paula Kent, possible witness only, Northwest Economic Associates.** Ms.
12 Kent may testify regarding her collection of the following information: (A) documents
13 relating to land ownership interests of parcels on the Lummi Peninsula; and (B) documents
14 indicating when groundwater was put to use on the Lummi Peninsula by various non-Indian
15 defendants.

16 **2. Lora McKusick, possible witness only, Northwest Economic Associates.**
17 Ms. McKusick prepared several maps that were used by NEA experts in their analyses of
18 various issues. If required, Ms. McKusick will testify regarding the authenticity and accuracy
19 of the maps she prepared.

20 **3. Greg Argel, possible witness only, Bureau of Indian Affairs, 911 NE 11th**
21 **Avenue, Portland, OR 97232.** Mr. Argel may testify about the title records for lands held in
22 Indian ownership on the Lummi Peninsula.

23 **4. Dave Nazy, possible witness only, Washington Department of Ecology,**
24 **Water Resource Program, P.O. Box 46700, Olympia, WA 98504.** Mr. Nazy may be called
25 to testify about his opinions regarding the amount of groundwater that is available for use on
26 the Lummi Peninsula and the State's anti-degradation policy as it applies to salt water
27

1 intrusion in groundwater supplies.

2 **5. Jim Bucknell, possible witness only, c/o Washington Department of**
3 **Ecology (Retired).** Mr. Bucknell may be called to testify about DOE's regulatory policies
4 and practices in the Nooksack Basin and the Lummi Peninsula.

5 **6. Ed Mohs, possible witness only, 4717 Rural Ave, Bellingham, WA 98226.**
6 Mr. Mohs may testify about the location of his Well.

7
8 **B. On behalf of the Lummi Nation:**

9 **1. Darrell Hillaire, Chairman, Lummi Indian Business Council, 2616 Kwina**
10 **Road, Bellingham, WA 98226.** Chairman Hillaire will testify about the Lummi Nation's
11 governmental organization and structure, and its planning for future development within the
12 Lummi Reservation.

13 **2. Larry G. Kinley, General Manager, Lummi Indian Business Council, 2616**
14 **Kwina Road, Bellingham, WA 98226.** Mr. Kinley is a former member of the Lummi Indian
15 Business Council who has served as Chairman of the LIBC in the past. He will testify
16 regarding the administrative organization and programs of the Lummi Indian Business
17 Council over the past thirty years, the evolution of the federal Indian Self-Governance
18 Program and its application to the Lummi Reservation, and the Nation's relationship with
19 non-member property owners on water rights matters.

20 **3. Richard Jefferson, Planning Director, Lummi Indian Business Council,**
21 **2616 Kwina Road, Bellingham, WA 98226.** Mr. Jefferson is a former member of the
22 Lummi Indian Business Council who will testify regarding the Nation's planning for future
23 development within the Lummi Reservation.

24 **4. Jeremy Freimund, Director, Lummi Nation Water Resources Department,**
25 **2616 Kwina Road, Bellingham, WA 98226.** Mr. Freimund will testify regarding the
26 organization and functions of the Water Resources Department, the management of the case
27

1 area aquifer, and the relationship between the Lummi Nation and the Washington state
2 Department of Ecology on water rights and water use issues both within the Lummi
3 Reservation and within the Nooksack River Basin.

4 **5. Gerald I. James, Treasurer, Lummi Indian Business Council, 2616 Kwina**
5 **Road, Bellingham, WA 98226.** Mr. James is a current member of the Lummi Indian
6 Business Council and a former Vice-Chairman of the LIBC. He may testify regarding the
7 Nation's interests in water-related issues both within the Lummi Reservation and within the
8 Nation's usual and accustomed fishing areas.

9 **6. David Oreiro, Vice President, Northwest Indian College, 2616 Kwina Road,**
10 **Bellingham, WA 98226.** Mr. Oreiro is a Lummi member who may testify regarding the
11 history and development plans of Northwest Indian College within the Lummi Reservation.

12 **7. Marc Taylor, former Finance Director, LIBC, 2616 Kwina Road,**
13 **Bellingham, WA 98226.** Mr. Taylor is a Lummi member who may testify regarding the
14 financial condition of the Lummi Nation and its present and future enterprises.

15 **8. Cheryl McBride, Principal, Lummi Tribal School, 2616 Kwina Road,**
16 **Bellingham, WA 98226.** Ms. McBride is a Lummi member who may testify regarding the
17 history, development and future plans of new tribal school that is opening on the Lummi
18 Reservation.

19 **9. Barbara Finkbonner, Director, Lummi Health Center, 2616 Kwina Road,**
20 **Bellingham, WA 98226.** Ms. Finkbonner is a Lummi member who may testify about the
21 history, development and future plans of the Lummi Clinic and related facilities such as the
22 Fitness Center.

23 **10. Bill McCourt, General Manager, Lummi Tribal Water and Sewer District,**
24 **2156 Lummi View Drive, Bellingham, WA 98226.** Mr. McCourt may testify regarding the
25 operation and services provided by the Lummi Nation's Water and Sewer District.

26 **11. Joe Mace, Manager, Lummi Commercial Company, 2616 Kwina Road,**
27

1 **Bellingham, WA 98226.** Mr. Mace may testify regarding Lummi's present commercial
2 enterprises and the Nation's future economic development plans.

3
4 **C. On behalf of Defendants:**

5 **1. LeRoy Deardorff, will testify, 2289-C Lummi Shore Road, Bellingham,**
6 **WA 98226.** Mr. Deardorff may testify as a witness regarding the Lummi Nation's reserved
7 water rights claims, present and future water use on the reservation, and other matters
8 covered in his deposition by Defendants in this case.

9 **2. Jeremy Freimund, will testify, 2630 Park Street, Bellingham, Washington**
10 **98225.** Mr. Freimund may testify as a witness regarding the Lummi Nation's reserved water
11 rights claims, current and future water needs, the extent of interference between Lummi and
12 non-Lummi wells on the Reservation, and other matters covered in his deposition by the
13 Defendants in this case.

14 **3. Gerald I. James, will testify, 2800 Leeward Way, Bellingham, WA 98226.**
15 Mr. James may testify as a witness regarding the reasons the reservation remains largely
16 undeveloped, the reserved right claims of the Lummi Nation, its current water use, its goal of
17 reacquiring land sold out of trust, and other matters covered in the deposition Defendants
18 took of him in this case.

19 **4. Merle Jefferson, will testify, 4085 Lummi Shore Road, Bellingham, WA**
20 **98226.** Mr. Jefferson may testify as a witness regarding the Lummi Nation's claims for
21 reserved water rights, its current water use, its goal of reacquiring land sold out of trust, the
22 locations being actively considered by the Lummi Nation for economic development on and
23 off the Reservation, and other matters covered in the deposition Defendants took of him in
24 this case.

25 **5. Richard Jefferson, will testify, 3041 Lummi Shore Road, Bellingham, WA**
26 **98226.** Mr. Jefferson may testify as a witness regarding future development plans for the
27

1 Lummi Reservation and other matters covered in his deposition by the Defendants in this
2 case.

3 **6. Vela K. Kamkoff, will testify, 2612 Lummi View Drive, Bellingham,**
4 **WA 98226-9290.** Ms. Kamkoff may testify as a witness regarding the Lummi nation's
5 criteria for tribal membership, its numbers of currently enrolled members, the number of
6 enrolled members whose children will be ineligible for membership in the Lummi Nation
7 based on its current membership criteria if those members marry non-Indians, and other
8 matters covered in the deposition Defendants took of her in this case.

9 **7. Victor Solomon, will testify, 2101 Lummi Shore Drive, Bellingham, WA**
10 **98226.** Mr. Solomon may testify as a witness regarding the matters of the amount of water
11 currently being used on the Lummi Peninsula, the current water needs and sources of supply,
12 and other matters covered in his deposition by the Defendants in this case.

13 **8. Joseph D. Mace, will testify, 2566 Mayflower Lane, Bellingham, WA**
14 **98226.** Mr. Mace is the General Manager of the Lummi Commercial Company and has
15 held other positions with the Lummi Nation. His testimony as an adverse witness will be
16 similar to his deposition taken on January 13, 2004, including, but not limited to, activities
17 conducted by the Lummi Commercial Company (LCC), Lummi Nation business activities,
18 employment of Lummi Tribal members by Lummi and the LCC, Lummi economic
19 activities past, present and planned for the future, his interactions with others relative to this
20 case, and documents such as Lummi financial statements, including all documents made
21 exhibits to his deposition.

22 **9. Greg Argell, will testify, 1436 SW Park Avenue, #502, Portland, OR**
23 **97201.** Mr. Argell is the Branch Chief of the Bureau of Indian Affairs, Land Titles and
24 Record Office in Portland, Oregon. His testimony will concern real estate and title issues
25 similar to his deposition taken on February 25, 2004.

26 **10. Marc Taylor, will testify, 3069 Lummi Shore Road, Bellingham, WA**
27
28

1 **98226.** Mr. Taylor is currently Finance Director for the Lummi Indian Business Council.
2 As an adverse witness he will be asked financial and business activity questions, similar to
3 those asked at his deposition taken February 11, 2004.

4 **11. Linnea Smith, will testify, 2808 Leeward Way, Bellingham, WA 98226.**

5 Mrs. Smith is a member of the Georgia Manor Water Association as well as one of its
6 officers and board members. Mrs. Smith will testify regarding matters pertaining to the
7 Water Association, including but not necessarily limited to, the Association's water rights,
8 water system, water usage, membership and history of the Association. Mrs. Smith may
9 also testify about her personal situation as a home owner and the impact the relief sought by
10 the Plaintiffs would have on herself and her husband.

11 **12. Kris Heintz, will testify, 3411 Robertson Road, Bellingham, WA 98226.**

12 Mrs. Heintz is a member of the Georgia Manor Water Association as well as one of its
13 officers and board members. Mrs. Neintz will testify regarding matters pertaining to the
14 Water Association, including but not necessarily limited to, the Association's water rights,
15 water system, water usage, membership and history of the Association. Mrs. Heintz may
16 also testify about her personal situation as a home owner and the impact the relief sought by
17 the Plaintiffs would have on herself and her husband.

18 **13. Esperanza Moreno, will testify, PO Box 1597, Bellingham, WA 98227.**

19 Will testify generally to her personal experiences as a Lummi Peninsula land owner and
20 dealings with the Lummi.

21 **14. Albert and Judy Sperry, will testify, PO Box 933, Burlington, WA**

22 **98233.** Will testify generally to personal experiences as Lummi Peninsula land owners and
23 dealings with the Lummi.

24 **15. Troy Curran, will testify, 800 Marine Drive, Bellingham, WA 98225.**

25 Will testify generally to his personal experiences as a Lummi Peninsula land oner, dealings
26 with the Lummi, historical water use, and the effects of the relief sought by plaintiffs.

1 **16. Mr. and Mrs. Dan Walker, possible witnesses only, 4081 Sucia**
2 **Drive, Ferndale, WA 98248.** Will testify regarding matters pertaining to the Lummi
3 Water and Sewer Board, and about their personal situation as home owners and the impact
4 if the relief sought by the plaintiffs was granted.

5 **17. Mr. and Mrs. Jeff McKay, possible witnesses only, 4693 Sucia Drive,**
6 **Ferndale, WA 98248.** May testify regarding matters pertaining to the Lummi Water and
7 Sewer Board, and about their personal situation as home owners and the impact if the relief
8 sought by the plaintiffs was granted.

9 **18. Joanne Kotjan, possible witness only, 2107 Lummi Shore Road,**
10 **Bellingham, WA 98226.** May testify generally to her personal experiences as a Lummi
11 Peninsula land owner, dealings with the Lummi, and the effects of the relief sought by
12 plaintiffs.

13 **19. Mike Sofie, possible witness only, 3703 Consolidation Avenue,**
14 **Bellingham, WA 98225.** May testify generally to his personal experiences as a Lummi
15 Peninsula land owner and dealings with the Lummi.

16 **20. Carolla and Horst Kosel, possible witness only, E31 Susan Court,**
17 **Union, WA 98592.** Will testify generally to personal experiences as Lummi Peninsula
18 land owners, dealings with the Lummi, and the effects of the relief sought by plaintiffs.

19 **21. Mike Heintz, possible witness only, 3411 Robertson Road, Bellingham,**
20 **WA 98226.** Mr. Heintz will testify regarding the Sunset Water Associations Water
21 System.

22 **22. Gary Smith, possible witness only, 3659 Harnden Road, Bellingham,**
23 **WA 98226.** Gary Smith is a member of the Harnden Island View Water Association as
24 well as one of its officers and board members. Mr. Smith may testify regarding matters
25 pertaining to the Water Association, including but not necessarily limited to, its water
26 rights, water system, water usage and membership. Mr. Smith may also testify about his
27

personal situation as a home owner and the impact to himself if the relief sought by the Plaintiffs was granted.

23. Tom Anderson, possible witness only, 1705 Trigg Road, Ferndale, WA, 98248. Mr. Anderson is the Manager for Whatcom Public Utility District No. 1. Mr. Anderson may testify regarding the PUD's Water System and Water Rights. Mr. Anderson may also testify about discussions between the PUD and Lummi Representatives regarding the PUD providing water to the Lummi Nation and/or business to be located on the Reservation.

24. **Jim Bucknell, possible witness only.** Mr. Bucknell was designated as a Rule 30(b)(6) witness by the Department of Ecology. Mr. Bucknell may be called to testify regarding the same matters he was questioned about during his June 21, 2004 deposition, including the Defendants Water Rights and the State's regulatory role on the Lummi Reservation. It is anticipated that the parties will stipulate to most of the facts relative to what Mr. Bucknell testified in his deposition, making his trial testimony unnecessary.

25. Carolyn Dwyer, possible witness only, 3655 Harnden Road, Bellingham, WA 98226. Carolyn Dwyer may testify regarding the history of Harnden Island View Water Association.

26. Steven S. Axtell, possible witness only, 2155 Lummi Shore Road, Bellingham, WA 98226. Steven Axtell may testify regarding early use of water on his property and the effects if plaintiffs prevail on their claim that homeowners receive no water.

27. Jack, Lois and Cindy Brooks, possible witnesses only, 2159 Lummi Shore Road, Bellingham, WA 98226. Jack, Lois and Cindy Brooks may testify regarding early use of water on their property and the effects if plaintiffs' prevail on their claim that homeowners receive no water.

1 **28. Dorothy Drumheller and Nelly Cunningham, possible witnesses only,**
2 **PO Box 578 (2183 Lummi Shore Road), Bellingham, WA 98227.** Dorothy Drumheller
3 and Nelly Cunningham may testify regarding early use of water on their property and the
4 effects if plaintiffs prevail on their claim that homeowners receive no water.

5 **29. Robert Earl and Roberta Wade-Earl , possible witnesses only, 2814**
6 **Douglas Road (2127 Lummi Shore Road), Ferndale, WA 98248.** Robert Earl and
7 Roberta Wade-Earl may testify regarding early use of water on their property and the
8 effects if plaintiffs prevail on their claim that homeowners receive no water.

9 **30. Walter Edson, possible witness only, PO Box 82373 (2103 Lummi Shore**
10 **Road), Kenmore, WA 98028.** Walter A. Edson may testify regarding early use of water
11 on his property and the effects if plaintiffs prevail on their claim that homeowners receive
12 no water.

13 **31. Bernard Fernandez and Lesli Higginson, possible witnesses only, 2115**
14 **Postal Avenue, Bellingham, WA 98226.** Bernard Fernandez and Lesli Higginson may
15 testify regarding early use of water on their property and the effects if plaintiffs prevail on
16 their claim that homeowners receive no water.

17 **32. Robert Gutierrez and Eva Gutierrez, possible witnesses only, 1016 NE**
18 **72nd Street (2139 Lummi Shore Road), Seattle, WA 98115.** Robert and Eva Gutierrez
19 may testify regarding early use of water on their property and the effects if plaintiffs prevail
20 on their claim that homeowners receive no water.

21 **33. John Hoffmann and Suzanne Hoffmann, possible witnesses only, 2167**
22 **Lummi Shore Road, Bellingham, WA 98226.** John and Suzanne Hoffmann may testify
23 regarding early use of water on their property and the effects if plaintiffs prevail on their
24 claim that homeowners receive no water. Also will describe the history of Exhibit A38 and
25 water use on Pepa Howa Illahee plat.

26 **34. Joanne Kotjan and Janet Ott, possible witnesses only, 2107 Lummi**
27

1 **Shore Road, Bellingham, WA 98226.** Joanne Kotjan and Janet Ott may testify regarding
2 early use of water on their property and the effects if plaintiffs prevail on their claim that
3 homeowners receive no water.

4 **35. Edna Morse, possible witness only, 2095 Postal Avenue, Bellingham,**
5 **WA 98226.** Edna Morse may testify regarding early use of water on her property and the
6 effects if plaintiffs prevail on their claim that homeowners receive no water.

7 **36. Joyce Nielsen, possible witness only, 3133 Sunset Way (2151 Lummi**
8 **Shore Road), Bellingham, WA 98226.** Joyce Nielsen may testify regarding early use of
9 water on his property and the effects if plaintiffs prevail on their claim that homeowners
10 receive no water.

11 **37. Michael Ring, possible witness only, 2163 Lummi Shore Road,**
12 **Bellingham, WA 98226.** Michael Ring may testify regarding early use of water on his
13 property and the effects if plaintiffs prevail on their claim that homeowners receive no
14 water.

15 **38. Cecil Shields, possible witness only, 2143 Lummi Shore Road,**
16 **Bellingham, WA 98226.** Cecil Shields may testify regarding early use of water on his
17 property and the effects if plaintiffs prevail on their claim that homeowners receive no
18 water.

19 **39. Douglas Smith and Linda Smith, possible witnesses only, 2201 Lummi**
20 **Shore Road, Bellingham, WA 98226.** Douglas and Linda Smith may testify regarding
21 early use of water on their property and the effects if plaintiffs prevail on their claim that
22 homeowners receive no water.

23 **40. Randall Stocker and Debbra Wittig, possible witnesses only, 2195**
24 **Postal Avenue, Bellingham, WA 98226.** Randall Stocker and Debbra Wittig may testify
25 regarding early use of water on their property and the effects if plaintiffs' prevail on their
26 claim that homeowners receive no water.

1 **41. Martreck Trecker, possible witness only, 2147 Lummi Shore Road,**
2 **Bellingham, WA 98226.** Martreck Trecker may testify regarding early use of water on his
3 property and the effects if plaintiffs prevail on their claim that homeowners receive no
4 water. Also will describe the history of Exhibit A38 and water use on Pepa Howa Illahee
5 plat.

6 **42. Peter Osvaldik and Olga Osvaldik, possible witnesses, 2987 Haxton**
7 **Way, Bellingham, WA 98226.** Peter and Olga Osvaldik may testify regarding early use of
8 water on their property and the effects if plaintiffs prevail on their claim that homeowners
9 receive no water.

10 **43. Ramona Martens, possible witness only, 4748 Pacific Highway,**
11 **Bellingham, WA 98226.** Ramona Martens may testify regarding early use of water on her
12 property and the effects if plaintiffs prevail on their claim that homeowners receive no
13 water.

14 **NOTE: THE FOLLOWING ADDITIONAL 45 WITNESSES WERE**
15 **PROPOSED BY THE HOMEOWNER DEFENDANTS**
16 **ON SEPTEMBER 15, 2004 AT 2:25 P.M.**

17 **PLAINTIFFS OBJECT TO THE UNTIMELY ADDITION**
18 **OF THESE WITNESSES TO THE PRETRIAL ORDER,**

19 because all of these witnesses were known to Defendants at all times,
20 because the Homeowner Defendants have not offered any excuse for failing
21 to identify them at the time required by law, and because
22 their testimony will not add anything to the case.

23 **44. Nicole Autry, "possible witness only", 4152 Meridian Street, Suite 105**
24 **(2937 Haxton Way), Bellingham, WA 98226.** Nicole Autry may testify regarding use of
25 water on defendants' lands.

26 **45. Ralph Barker and Ruth Barker , "possible witnesses only", 2751**
27 **Haxton Way, Bellingham, WA 98226.** Ralph Barker and Ruth Barker may testify
28 regarding use of water on defendants' lands.

46. Larry Berghoff, "possible witness only", 3413 Lummi Shore Road
Bellingham, WA 98226. Larry Berghoff may testify regarding use of water on defendants'

1 lands.

2 **47. Gerald Boyd, "possible witness only", 787 Lange Road (3053 Haxton**
3 **Way) Bellingham, WA 98226.** Gerald Boyd may testify regarding use of water on
4 defendants' lands.

5 **48. Stanley Campbell and Kay Campbell, "possible witnesses only",2870 E.**
6 **Bakerview Road (2961 Haxton Way), Bellingham, WA 98226.** Stanley Campbell and
7 Kay Campbell may testify regarding use of water on defendants' lands.

8 **49. Myron Carr and Marilyn Carr, "possible witnesses only", 528 NE 88th**
9 **Street, Seattle, WA 98115 and 2245 Lummi Shore Road, Bellingham, WA 98226.**
10 Myron Carr and Marilyn Carr may testify regarding use of water on defendants' lands.

11 **50. Jeffrey Clark and Mildred Clark, "possible witnesses only",1401**
12 **Meyerwood Lane (2200 Lummi Shore Road), Highlands, CO 80129.** Jeffrey Clark and
13 Mildred Clark may testify regarding use of water on defendants' lands.

14 **51. Albert Coghill and A.B. Coghill, "possible witnesses only", 12399 Eagle**
15 **Drive, Burlington, WA 98233.** Albert Coghill and A.B. Coghill may testify regarding use
16 of water on defendants' lands.

17 **52. Dennis Demorest and Barbara Demorest, "possible witnesses**
18 **only",3670 Haggin Street, Bellingham, WA 98226.** Dennis Demorest and Barbara
19 Demorest may testify regarding use of water on defendants' lands.

20 **53. Paul Enfield and Mary Enfield, "possible witnesses only",3320 Oregon**
21 **Place (2989 Haxton Way/co-owners), Bellingham, WA 98226.** Paul Enfield and Mary
22 Enfield may testify regarding use of water on defendants' lands.

23 **54. James Buizer and Dee Buizer, "possible witnesses only", 6023 E.**
24 **Turquoise Avenue (2989 Haxton Way/co-owners), Paradise Valley, AZ 85253.** James
25 Buizer and Dee Buizer may testify regarding use of water on defendants' lands.

26 **55. Joanne Freeman, "possible witnesses only",9727 Allan Street, Blaine,**
27

1 **WA 98230.** Joanne Freeman may testify regarding use of water on defendants' lands.

2 **56. Patricia Haensly, "possible witnesses only", 3384 Northgate Road,**
3 **Bellingham, WA 98226.** Patricia Haensly may testify regarding use of water on
4 defendants' lands.

5 **57. Thomas Hahney and Cheryl Hahney, "possible witnesses only", 7928**
6 **Lynwood Drive (2763 Haxton Way), Ferndale, WA 98248.** Thomas Hahney and Cheryl
7 Hahney may testify regarding use of water on defendants' lands.

8 **58. Kenny Handy and Nancy Jackson, "possible witnesses only", 420**
9 **Thresher Avenue, Sedro Woolley, WA 98284.** Kenny Handy and Nancy Jackson may
10 testify regarding use of water on defendants' lands.

11 **59. Richard Hinshaw and Margaret Hinshaw, "possible witnesses only",**
12 **PO Box 1863, Bellingham, WA 98227.** Richard Hinshaw and Margaret Hinshaw may
13 testify regarding use of water on defendants' lands.

14 **60. Robert Huizenga and Linda Huizenga, "possible witnesses only", 3001**
15 **Kelbay Avenue, Bellingham, WA 98226.** Robert Huizenga and Linda Huizenga may
16 testify regarding use of water on defendants' lands.

17 **61. Michael Johnson, "possible witness only", 3415 Lummi Shore Road,**
18 **Bellingham, WA 98226.** Michael Johnson may testify regarding use of water on
19 defendants' lands.

20 **62. Robert Kandiko and Karen Neubauer, "possible witnesses only", 2245**
21 **A Lummi Shore Road, Bellingham, WA 98226.** Robert Kandiko and Karen Neubauer
22 may testify regarding use of water on defendants' lands.

23 **63. James LeSage and Hui-ying LeSage, "possible witnesses only", 601 12th**
24 **Avenue NW, #F2 (3009 Haxton Way), Issaquah, WA 98027.** James LeSage and Hui-
25 ying LeSage may testify regarding use of water on defendants' lands.

26 **64. Jerry Lowe, "possible witness only", 3321 Robertson Road, Bellingham,**
27

1 **WA 98226.** Jerry Lowe may testify regarding use of water on defendants' lands.

2 **65. Justin McCartney and Ashley Grafwallner (listed as Ashley**
3 **McCartney), "possible witnesses only", 2991 Haxton Way, Bellingham, WA 98226.**

4 Justin McCartney and Ashley Grafwallner may testify regarding use of water on defendants'
5 lands.

6 **66. Gerald Moore, "possible witness only", 1225 E. Sunset Drive, #382,**
7 **Bellingham, WA 98226 .** Gerald Moore may testify regarding use of water on defendants'
8 lands.

9 **67. Robert Nielsen, "possible witness only", PO Box 2789, Bellingham, WA**
10 **98227.** Robert Nielsen may testify regarding use of water on defendants' lands.

11 **68. Brian Oliver, "possible witness only", 2965 Haxton Way, Bellingham,**
12 **WA 98226.** Brian Oliver may testify regarding use of water on defendants' lands.

13 **69. Eunice Olsen, "possible witness only", 609 Bayside Road, Bellingham,**
14 **WA 98225.** Eunice Olsen may testify regarding use of water on defendants' lands.

15 **70. Larry Olsen and Luella Olsen, "possible witnesses only", 3215 Heights**
16 **Place, Bellingham, WA 98226.** Larry Olsen and Luella Olsen may testify regarding use
17 of water on defendants' lands.

18 **71. Jonn Randel, "possible witness only", 136 – 7293 Moffatt Road (2131**
19 **Lummi Shore Road/2134 Postal Avenue), Richmond, BC V6Y 3E4, Canada.** Jonn
20 Randel may testify regarding use of water on defendants' lands.

21 **72. Jennifer Reed, "possible witness only", 2644 Shorewood Lane,**
22 **Bellingham, WA 98226.** Jennifer Reed may testify regarding use of water on defendants'
23 lands.

24 **73. Richard Schmidt, "possible witness only", 3705 Canterbury Lane, #4,**
25 **Bellingham, WA 98225.** Richard Schmidt may testify regarding use of water on
26 defendants' lands.

use of water on defendants' lands.

83. Brian Wright and Jennifer Wright, "possible witnesses only", 2109 Lummi Shore Road, Bellingham, WA 98226. Brian Wright and Jennifer Wright may testify regarding use of water on defendants' lands.

84. Mike Melcher and Terry Melcher, "possible witnesses only", 3633 Haxton Way, Bellingham, WA 98226. Mike Melcher and Terry Melcher may testify regarding use of water on defendants' lands.

85. Helen Follis, "possible witness only", 1470 Island View Drive, Bellingham, WA 98225. Helen Follis may testify regarding use of water on defendants' lands.

86. **Fred Filbert, "possible witness only", Ferndale, WA.** Fred Filbert may testify regarding use of water on defendants' lands.

87. Shirley Bezona, "possible witness only", 2219 Lummi Shore Road, Bellingham, WA 98226. Shirley Bezona may testify regarding use of water on defendants' lands.

88. Harold Kolb, "possible witness only", 730 Poplar Drive, Bellingham, WA 98226. Harold Kolb may testify regarding use of water on defendants' lands.

VI. EXHIBITS

See attached Exhibit Matrix.

VII. ACTION BY THE COURT

(A) This case is scheduled for trial without a jury on _____, at _____.

(B) Trial briefs were submitted to the Court on September 7, 2004.

©) Other rulings by the Court at the Pretrial Conference:

DRAFT AGREED PRETRIAL ORDER - 62-
United States et al v. Dept. of Ecology et al
W.D.Wa. Cause # 01cv0047Z

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DATED this ____ day of September, 2004.

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